

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs at Knoxville April 24, 2007

PERRY SINGO v. STATE OF TENNESSEE
Appeal from the Circuit Court for Dickson County
No. CR7861 Robert Burch, Judge

No. M2006-01986-CCA-R3-PC - Filed June 27, 2007

In March 2000 the petitioner, Perry Singo, was convicted in Dickson County Circuit Court of four counts of rape of a child and four counts of aggravated sexual battery. The petitioner was sentenced to the maximum sentence on each count, with two of the child rape counts to run consecutively and all other counts to run concurrently, resulting in an effective sentence of fifty years. On direct appeal, this court reversed three of the child rape convictions and remanded to the trial court for re-sentencing. State v. Perry Singo, No. M2001-00919-CCA-R3-CD, 2002 WL 1838142, at *1 (Tenn. Crim. App. at Nashville, Aug. 9, 2002) (Perry Singo I). On remand, the trial court ran two of the aggravated sexual battery counts consecutive to the remaining child rape count, resulting in an effective sentence of forty-nine years. This court affirmed the trial court's revised judgment. State v. Perry Singo, No. M2003-01230-CCA-R3-CD, 2004 WL 343968, at *1 (Tenn. Crim. App. at Nashville, Feb. 24, 2004) (Perry Singo II). The petitioner then filed a petition for post-conviction relief. A hearing was held in the trial court in May 2006, and the trial court denied the petition in June 2006. The petitioner appeals, alleging judicial vindictiveness on the part of the trial court in imposing its second sentence, as well as ineffective assistance of counsel. After reviewing the record, we affirm the ruling of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and NORMA MCGEE OGLE, JJ., joined.

James L. Baum, Burns, Tennessee, for the appellant, Perry Singo.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Dan M. Alsobrooks, District Attorney General; Suzanne Lockert, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On the initial direct appeal, this court dismissed three of the petitioner's child rape convictions because there was no proof that the offenses were committed in Tennessee. Perry Singo

I, 2002 WL 1838142, at *5. Because sentencing was not raised as an issue on the initial appeal, this court remanded the case to the trial court “for a determination of whether any of the aggravated sexual battery convictions should run consecutively to the child rape conviction.” *Id.* at *11. At the resentencing hearing, the petitioner did not raise the length of the individual sentences as an issue, instead arguing that the aggravated sexual battery convictions should run concurrent to the remaining child rape conviction. The trial court, alluding to enhancement factors that had been established at the first trial (while not naming them),¹ imposed the maximum sentence on all counts and ordered two of the sexual battery convictions to run consecutively, although the judge did not give extensive reasons why the sentences should run consecutively. On appeal, this court, while noting that “the trial court should have been more explicit with its findings,” affirmed the trial court’s imposed sentence of forty-nine years. *Perry Singo II*, 2004 WL 343968, at *2.

In his post-conviction petition, the petitioner alleged numerous grounds for relief, most of which focused on ineffective assistance of counsel. At the post-conviction hearing, the petitioner called one witness: his attorney at trial and on both direct appeals. Counsel testified that he did not recall asking for a mental health evaluation of his client. Counsel stated that he did not order a mental health evaluation because he only requests such evaluations “if I believe that they are not competent to stand trial or if I believe that insanity is a defense and in dealing with Mr. Singo I didn’t see any reason to ask for [an evaluation].” Counsel also testified that he didn’t recall presenting any mitigating factors, though “[the factors] would be in the pre-sentence report if we did.”

When asked if he presented evidence that his client had been abused as a child, counsel replied:

I don’t think we did. This is a case where [the state] ordered the psychological assessment that’s required by statute, which I disagree with. I’ve never found those to be advantageous to my clients. And the best that I can recall is that in this case overall I did not find it to be advantageous. . . . [T]he gist of that pre-sentence report was that he was very likely to offend again, I believe. . . . I recall that [it] was not a favorable report, and I don’t think I even chose to introduce that or argue anything in that because I think overall it was detrimental.

Counsel also testified that he did not present evidence that his client possessed a personality disorder.

When asked if he challenged any of the enhancement factors submitted by the state, counsel replied that he did not recall if he challenged them, but he did argue that consecutive sentencing was not appropriate in his client’s case. On cross-examination, counsel stated this case was extremely difficult, and he believed that he did all that he could do in the case.

The petitioner did not present any evidence, either in his petition for post-conviction relief

¹Neither the petitioner nor the state included the transcript from the original sentencing hearing for this appeal, and the transcript of the first sentencing hearing is not included with this court’s record of the first appeal.

or at the post-conviction hearing, regarding his mental health. During his closing statement, the petitioner's attorney also raised the claim that the trial judge, by ordering that two of the aggravated sexual battery convictions which had previously been imposed as concurrent sentences be served consecutively to the remaining rape conviction, had exercised vindictiveness upon resentencing. The post-conviction court found that all of the petitioner's claims were without merit and denied post-conviction relief. On appeal, the petitioner limits his arguments to the claims of judicial vindictiveness and ineffective assistance of counsel based on his trial attorney's failure to introduce mitigating factors and challenge the enhancement factor of vulnerability due to the child's age.

STANDARD OF REVIEW: POST-CONVICTION PROCEEDINGS

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f) (2006). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). The petitioner's claims are reviewed under a de novo standard with no presumption of correctness. Id. at 457.

JUDICIAL VINDICTIVENESS

The petitioner claims that the trial court "failed to specify why [it] changed the sentencing to run two of the aggravated sexual battery counts consecutively," and absent such an explanation, "there is a presumption of vindictiveness that impairs Petitioner's right to seek appellate review of the Trial Court's judgments." However, we find this claim to be without merit. Tennessee's Post-Conviction Procedure Act states,

A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.

Tenn. Code Ann. § 40-30-106(h) (2006). In this case, the petitioner bases his judicial vindictiveness claim largely on the trial court's alleged failure to justify running two of the aggravated sexual battery counts, which had been imposed concurrently at the first sentencing hearing, consecutively. However, the petitioner argued this issue on direct appeal, and this court considered and rejected his argument, concluding that the trial court's revised sentence of forty-nine years was appropriate. Perry Singo II, 2004 WL 343968, at *2-*3. Thus, the petitioner cannot be provided relief on this issue.

Furthermore, even if the issue had not been previously determined, the petitioner's claim would be without merit. The United States Supreme Court has held that a harsher sentence after a new trial raises a presumption of "judicial vindictiveness," which may be overcome by an affirmative

showing on the record of the reasons for the harsher sentence. North Carolina v. Pearce, 395 U.S. 711, 725-26, 89 S. Ct. 2072, 2080-81 (1969). In subsequent cases, the Court clarified that the presumption of vindictiveness announced in Pearce “do[es] not apply in every case where a convicted defendant receives a higher sentence on retrial.” See Alabama v. Smith, 490 U.S. 794, 799, 109 S. Ct. 2201, 2204 (1989) (quoting Texas v. McCullough, 475 U.S. 134, 138, 106 S. Ct. 976, 979 (1986)). The Supreme Court limited the application of Pearce to circumstances “in which there is a ‘reasonable likelihood’ . . . that the increase is the product of actual vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness.” Smith, 490 U.S. at 801 (citing Wasman v. United States, 468 U.S. 559, 569, 104 S. Ct. 3217, 3223 (1984)).

In the instant case, the petitioner argues that the trial judge exercised vindictiveness because he imposed a sentence of forty-nine years and converted two of the sentences for aggravated sexual battery from concurrent sentences to consecutive ones. However, the petitioner ignores three main points. First, the petitioner was given one less year in his revised sentence than in his original sentence, so the revised sentence was not greater than the first one. Second, while the trial judge in the resentencing hearing did not give explicit reasons as to why the sentences on two of the aggravated sexual battery convictions were to run consecutively, the trial court did give several rational reasons for imposing its sentence, such as the time span of the petitioner’s undetected sexual activity, the letters he wrote while in prison which indicated that if released, he would continue his inappropriate sexual activity, the petitioner’s belief that he had done nothing wrong in committing the offenses, and the nature and scope of the petitioner’s sexual acts. Finally, as the post-conviction court noted, “the trial court [upon resentencing] did exactly what the appellate court instructed it to do, to wit: ‘ . . . we remand to the trial court for a determination of whether any of the aggravated sexual battery convictions should run consecutively to the child rape conviction.’” In light of the evidence, the petitioner did not prove by clear and convincing evidence that the trial court exercised vindictiveness upon resentencing.

INEFFECTIVE ASSISTANCE OF COUNSEL

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel’s performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel’s performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, “the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. The Strickland standard has been applied to the right of counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

The petitioner must satisfy both prongs of the Strickland test to prevail on a claim of ineffective assistance of counsel. See Henley v. State, 960 S.W.2d 572, 579-80 (Tenn. 1997). The performance prong requires the petitioner to show that the counsel’s representation fell below an

objective standard of reasonableness or “outside the wide range of professionally competent assistance.” Strickland, 466 U.S. at 690. The prejudice prong requires the petitioner to demonstrate that “there is a reasonable probability that, but for counsel’s professional errors, the result of the proceeding would have been different.” Id. at 694. “A reasonable probability means a probability sufficient to undermine confidence in the outcome.” Id. Failure to satisfy either prong results in the denial of relief. Id. at 687.

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Also, in reviewing counsel’s conduct, a “fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from the counsel’s perspective at the time.” Strickland, 466 U.S. at 689. Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. See DeCoster, 487 F.2d at 1201.

Failure to Challenge Application of Enhancement Factor

The petitioner claims that his attorney provided ineffective assistance of counsel by failing to object to the state’s mentioning of the victim’s age during the resentencing hearing. Had the attorney done so, the petitioner claims that the enhancement factor of “particular vulnerability because of age or physical or mental disability” would not have applied. See Tenn. Code Ann. § 40-35-114(5) (2006). However, we cannot grant relief to the petitioner on this claim. We initially note that the petitioner did not submit the transcript from the original (2000) sentencing hearing, and that the resentencing hearing transcript only addresses the issue of concurrent or consecutive sentencing. Without the transcript of the original sentencing hearing, this court is unable to determine if the petitioner’s trial counsel failed to challenge the enhancement factors at the sentencing hearing as alleged.

Additionally, while the petitioner is correct that in most circumstances elements of an offense cannot be used as enhancement factors, our supreme court has held that in cases such as this one, “[the child’s age] alone does not prohibit the use of the vulnerability enhancement factor. The reason is that the relevant inquiry is not simply whether the victim is under the age of thirteen, but instead whether the victim was *particularly vulnerable* because of age or physical or mental disability.” State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993) (emphasis in original). For purposes of applying the enhancement factor, “particularly vulnerable” means “incapable of resisting, summoning help, or testifying against the perpetrator. This is a factual issue to be resolved by the trier of fact on a case by case basis.” Id. Thus, even had the petitioner’s attorney objected to the state’s mentioning the victim’s age at either sentencing hearing, the trial court still could have

applied the enhancement factor if it determined that the child was “particularly vulnerable.” Finally, even if this particular enhancement factor would have been excluded, the trial court still could have imposed the maximum sentence in light of the other evidence presented in this case; of note, while our court overturned three of the rape convictions based on evidence that the offenses were committed in Michigan and not Tennessee, these offenses could have been used by the trial court to justify use of the “previous criminal behavior” enhancement factor, see Tenn. Code Ann. § 40-35-114(1), as the jury found the facts of these offenses beyond a reasonable doubt. In short, the petitioner has failed to show how his attorney’s failure to object to the state’s mentioning the victim’s age has prejudiced him. Accordingly, we must deny the petitioner relief on this issue.

Failure to Provide Evidence of Mitigating Factors

The petitioner claims that his attorney failed to provide evidence of mitigating factors at either sentencing hearing. According to the petitioner, had the attorney done so, the petitioner may have avoided being sentenced to the maximum term on each count. At the post-conviction hearing, the petitioner’s trial attorney testified that he did not introduce evidence of the petitioner’s alleged childhood abuse and did not introduce evidence of any mental illnesses from which the petitioner allegedly suffers. However, the petitioner did not introduce any evidence at the post-conviction hearing that would have supported his claims. The petitioner did not have any expert testify at the post-conviction regarding his mental history, and the petitioner did not include a psychological evaluation as part of his post-conviction petition. Absent any evidence that would have supported applying mitigating factors, the petitioner is not entitled to relief on this issue. See Michael Wright v. State, No. M2004-00393-CCA-R3-PC, 2005 WL 544729, at *4 (Tenn. Crim. App. at Nashville, Mar. 8, 2005).

CONCLUSION

For the reasons established above, we affirm the trial court’s denial of post-conviction relief.

D. KELLY THOMAS, JR., JUDGE